



## ENFORCEMENT POLICY

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# ENFORCEMENT POLICY

**DIRECTORATE:** Planning and Compliance

**BUSINESS UNIT:** Community Standards

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## 1. PURPOSE/ OBJECTIVES

1.1 This policy sets out the process required for authorised officers to act promptly, consistently and effectively in response to allegations of unlawful activities.

1.2 This policy emphasises that all authorised officers with enforcement duties, functions and responsibilities should:

- a) Act at all times in good faith and within their powers of delegation.
- b) Apply standards of reasonableness, common sense and good judgment, while remaining firm and maintaining their ability to put in place effective resolution solutions when disputes occur.
- c) Comply with legislation.

1.3 This policy aims to:

- a) Provide clear guidelines for the management of Council's enforcement actions relating to unlawful activities;
- b) Provide a consistent approach to the investigation of unlawful activities and the effective resolution of matters that would otherwise give rise to civil and/ or criminal enforcement action;
- c) Manage civil and criminal enforcement action in a consistent and transparent manner and through best practice operational procedures;
- d) Ensure the principles of procedural fairness and natural justice are followed;
- e) Provide an effective process of community education, awareness and consultation;
- f) Determine whether complaints relating to unlawful activity require investigation;
- g) Determine whether enforcement action is required;
- h) Establish clear guidelines for all authorised officers when they issue penalty notices;
- i) Provide the local community with a practical, convenient and equitable environment in accordance with legislative requirements.
- j) Ensure that all alleged offences are recorded accurately and photographic evidence is practically available for all issued penalty notices as a means of substantiating all offences committed.

## 2. SCOPE

2.1 This policy applies to all enforcement actions relating to:

- a) Abandoned articles/ vehicles;
- b) Companion animals;
- c) Environmental protection;
- d) Fire safety;
- e) Food safety;
- f) Non-compliance with development consent conditions;
- g) Public health and safety;
- h) Pollution control and waste;
- i) Safety issues on public land;
- j) Swimming pools;
- k) Unauthorised development;
- l) Unauthorised use of premises on land; and
- m) Illegal parking.

2.2 Councils operate in an increasingly complex legal environment. Legislation that is the subject of enforcement by Council authorised officers or is otherwise relevant to the exercise of their delegated functions for the purposes of this policy, includes but is not limited to the following:

- a) *Boarding Houses Act 2012*;
- b) *Building Code of Australia*;
- c) *Companion Animals Act 1998*;
- d) *Contaminated Land Management Act 1997*;
- e) *Environmental Planning and Assessment Act 1979*;
- f) *Fines Act 1996*;
- g) *Food Act 2003*;
- h) *Impounding Act 1993*;
- i) *Local Government Act 1993*;
- j) *NSW Road Rules 2014*
- k) *Protection of the Environment Operations Act 1997*;
- l) *Public Health Act 2010*;
- m) *Swimming Pools Act 1992*;
- n) *Road Transport Act 2013*; and
- o) *Roads Act 1993*

## 3. DEFINITIONS

**Authorised officer** means an officer exercising delegated authority from the CEO.

**CEO** means the Chief Executive Officer of Council.

**Council** means Liverpool City Council

**Delegation** means the legal instrument whereby powers are conferred on an authorised officer by the CEO to act for and on behalf of Council as its agent where Council has been given those powers by legislation.

**Development** means the use of land or a building; demolition of a building or work; or any other thing controlled or regulated by legislation or an environment planning instrument.

**EPAA** means the *Environmental Planning and Assessment Act 1979*.

**Emergency Order** means a statutory order expressly given in an emergency under the LGA or EPAA.

**LGA** means the *Local Government Act 1993*.

**Notice** means a statutory notice issued under the Food Act 2003 (NSW), the PEOA, the EPAA, the LGA or any other Act.

**Caution** means an oral warning given by an authorised officer.

**Order** means a statutory order given or issued under the *Local Government Act 1993* or the *Environmental Planning and Assessment Act 1979*.

**PC** means a Principal Certifier as prescribed in the EPAA.

**POEO** means the *Protection of the Environment Operations Act 1997*.

**Penalty notice** means a penalty notice which is used for offences prescribed by legislation whereby a fine is given. The value of the fine is also prescribed by legislation.

**Property Information System** means the computerised property database maintained by the Council.

**Unlawful Activity** means any activity or work that has been or is being carried out:

- a) Contrary to the terms or conditions of a development consent, construction certificate, approval, or licence;
- b) Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- c) Without a required development consent, approval, or licence;
- d) Contrary to a legislative provision regulating a particular activity or work; or
- e) In contravention of an Act constituting an offence.

## **4. UNLAWFUL ACTIVITIES AND THE EXERCISE OF DISCRETION**

**4.1** When undertaking enforcement action and undertaking administrative activities relating to such enforcement action, authorised Council officers are to adhere to the provisions of:

- a) Relevant Council policies, including the Code of Conduct;
- b) Guidelines issued by the NSW Ombudsman;
- c) *Government Information (Public Access) Act 2009*; and
- d) *Privacy and Personal Information Protection Act 1998*.

### **4.2 Complaints process**

4.2.1 Unlawful activities are generally identified through complaints received from members of the public or through routine inspections carried out by authorised officers.

4.2.2 Details about the unlawful activities are recorded onto the Council's Property Information System (Customer Requests).

4.2.3 Timeframes for responding to complaints about unlawful activities may vary. However, every effort will be made to ensure that all complaints about unlawful activities are actioned within a timely manner and that complainants are given sufficient feedback on the progress of their complaint.

4.2.4 Priority will be given to complaints in accordance with the following categories:

- a) Category 1: Urgent and life-threatening matters will be actioned immediately following receipt of complaints or through proactive detection, such as unsafe building works, food poisoning, serious incidents where public health and safety are at risk, serious environmental matters;
- b) Category 2: General compliance matters should be dealt with on a priority basis having regard to the seriousness of the matter, such as. works carried out not in accordance with a development consent, or constructed without development consent, or illegal land use.
- c) Category 3: Minor matters, such as minor non-compliance of development consents should be actioned as available Council resources permit.

4.2.5 Council must consider a range of factors when determining whether the particular matter will warrant further and detailed investigation. However, if a decision is made not to investigate or act upon a complaint, the decision must be recorded with clear reasons as to why the investigation did not proceed. The complainant must then be advised of the decision and the reasons why no further action is being taken.

### **4.3 Investigating unlawful activities**

4.3.1 When deciding whether a complaint requires investigation, authorised officers ought to consider the following factors:

- a) Is the matter within the jurisdiction of Council or of a civil or private nature?
- b) Is the matter premature, e.g. does the complaint relate to some unfinished aspect of works that are still in progress?
- c) Is the activity or work permissible with or without development consent? If the work is permissible with development consent, is there consent in place?
- d) Is there another body that is more appropriate to investigate or deal with the matter?

4.3.2 As the appropriate regulatory authority, Council can take action in relation to any development or matter which it has power to regulate under an Act.

4.3.3 All complaints regarding unlawful activities and uses will be investigated by Council unless:

- a) The matter has been actioned and resolved, or
- b) A Principal Certifier is responsible for monitoring compliance with the conditions of development consent where a construction certificate has been issued for works to be carried out (i.e. construction of a building)

4.3.4 Council will investigate matters where there is evidence of:

- a) Environmental harm;
- b) Safety concerns;
- c) Major breaches of a development consent.

#### **4.4 Referring complaints for investigation by the Principal Certifier**

4.4.1 Complaints in relation to a privately certified development is to be referred to the Principal Certifier. The Private Certifier must issue a direction for any non compliance with the development approval.

4.4.2 Where urgent action is required, where a significant breach of the development consent has occurred, or environmental harm is occurring Council Authorised Officers may be required to investigate.

4.4.3 Where clear evidence is available that the nominated Private Certifier has acted outside their authority, Council's authorised officers, through their manager or director, may make formal written representations to the Commissioner for Fair Trading.

#### **4.5 Determining the need for enforcement action**

4.5.1 The enforcement options are as follows:

- a) Issue a notice;
- b) Issue an order;
- c) Issue a penalty notice; and
- d) Commence legal action.

## **4.6 Notices and orders**

4.6.1 Notice and orders provisions set out in the EPAA, LGA, POEO, *Swimming Pools Act* and the *Food Act* provide Council with formal, cost effective mechanisms to direct landowners and occupiers to do or refrain from doing something. These provisions involve the principles of natural justice and procedural fairness. Where appropriate, they should be used prior to the commencement of civil proceedings in the Land and Environment Court or the Local Court.

4.6.2 Both the EPAA and LGA set out the statutory framework to be followed when issuing notices of intention and giving orders. In summary the framework is as follows:

4.6.3 A notice of intention to issue an order must clearly:

- a) State that Council intends to issue an order;
- b) Set out the terms of the proposed order;
- c) State the period proposed to be specified as the period within which the order is to be complied with; and
- d) State that the person to whom the order is proposed to be given may make representations to a nominated person, as to the reason(s) that the order should not be given, or as to the terms of a period for compliance with that order.

4.6.4 A notice of intention may provide that the representations are to be made to the person who gives the order or a nominated person on a nominated date, being a date that is reasonable in the circumstances in the case.

4.6.5 If the recipient of an order fails to comply with the terms of the order, Council may commence class 4 proceedings in the Land and Environment Court to enforce compliance. The following matters are critical to the success of proceedings based on non-compliance with an order:

- a) The notice of the proposed order is given under the appropriate section of the relevant Act or Regulation;
- b) The period for making of a submission, stipulated in the notice of intention is reasonable;
- c) The order is not issued prior to the expiry of the period for making submissions set out in the notice of intention;
- d) any submission made by a recipient of a notice of intention was taken into consideration before an order is given; and
- e) The period of compliance, stipulated in the order, is reasonable.

## **4.7 Building Information Certificates/ Development Applications**

4.7.1 A person who has carried out unlawful works may apply for a Building Information Certificate under section 6.26 of the EPAA to prevent the unlawful works from being the subject of a demolition order and or a development application under the following circumstances:

- a) Any unauthorised class 10 structure that is ancillary to residential development does not require a DA and can only be legitimised by way of a Building Information Certificate. However, the building information certificate must be accompanied by a BCA report to ensure compliance with the BCA. It is important to note that a Building Information Certificate cannot be consented to unless compliance with the BCA is achieved.
- b) Any unauthorised class 1-10 (other than class 10 ancillary structures) structure will require a DA for use, which must also be accompanied by a BCA report to ensure compliance with the BCA. In this instance, a condition requiring a Building Information Certificate application will be included on any consent (if a Building Information Certificate application has not yet been lodged). However, it is important to note that consent can only be granted to after the BCA report has been reviewed by way of a building referral.

## **4.8 Civil and criminal proceedings**

- 4.8.1 As stated above, civil enforcement action can be taken in respect of an alleged breach of an Act. The most common examples where this type of action is taken relates to:
  - a) An application by Council to restrain an unauthorised use of land or the carrying out of illegal works upon land;
  - b) An application by Council to restrain breaches of conditions of development consent; or
  - c) An application by Council to seek a demolition order or orders that certain works be carried out to put a building in a satisfactory condition.
- 4.8.2 Council also has the option of initiating a criminal prosecution and thereby seeking a pecuniary (monetary) penalty in the Local Court or the Land and Environment Court.
- 4.8.3 It is critical when prosecuting a matter in either the Local Court or in the Land and Environment Court, that Council has sufficient prima facie evidence to prove each of the elements of the offence and that the evidence is in admissible form.
- 4.8.4 The decision to commence civil or criminal proceedings is to be discussed with the Manager Community Standards and advice provided by Council's Legal Services Unit where full consideration will be given to the complexity of the legal issues raised by the breach and the cost of any potential litigation. This includes adverse costs orders awarded to the respondent/ defendant in the event the matter is unsuccessful. Any litigation conducted in relation to enforcement must be undertaken in accordance with Council's Legal Services Policy.



## **4.9 Criteria for undertaking criminal prosecutions**

4.9.1 When exercising its discretion to take action, particularly when considering whether to commence criminal proceedings (summary enforcement) for unlawful activities, Council must have regard to whether the public interest will be served by such a prosecution.

4.9.2 There are many factors which authorised officers should take into account when exercising their discretion to enforce the law. The relevant factors include, but are not limited to the following:

- a) The seriousness of the alleged breach or offence, or whether it is of a technical nature; and the extent of the breach;
- b) The public risk created by the breach;
- c) The actual or potential harm to the environment;
- d) The availability and efficacy of other alternatives to taking enforcement action;
- e) Whether the breach is continuing;
- f) The prevalence of the alleged offence or breach and the need for deterrence;
- g) The effectiveness of proposed legal action;
- h) Any precedent set if legal action is not taken in a particular instance;
- i) The existence of mitigating circumstances;
- j) Prior warning, breaches, convictions etc.; and
- k) The public interest served by action being taken

4.9.3 Any decision to take criminal enforcement action must be based on proper grounds. Some key considerations include the following:

- a) Does the available evidence establish an initial (prima facie) case for action?
- b) Will the public interest be served by bringing such an action?
- c) Does Council have a duty to act?

4.9.4 Decisions regarding criminal prosecutions should not be influenced by:

- a) The alleged offender's political, business or community affiliations;
- b) The alleged offender's status in the community;
- c) Any aspects of discrimination; or
- d) The political, social; or other affiliations of those officers responsible for exercising the enforcement powers.

## **4.10 Recovery of costs and penalties**

The recovery of legal costs and penalties is always dependent upon the discretion of the court in either civil or criminal matters. It is Council's aim to recover costs if successful in the Land and Environment Court or Local Court proceedings on a fair and reasonable basis in accordance with section 694 of the LGA.

## **5.0 PARKING ENFORCEMENT**

### **5.1 Exercising discretion in regard to parking enforcement**

5.1.1 An authorised officer will assess each situation based on the guidelines supplied by the Attorney General's Department under the *Fines Act* 1996. These guidelines specify circumstances whereby an authorised officer may issue a caution in lieu of a penalty notice depending on the circumstances and severity of the incident.

5.1.2 The guidelines under the *Fines Act* 1996 state that:

- a) The decision to give a caution, rather than issue a penalty notice, requires the exercise of good judgment, involving an assessment of all the circumstances.
- b) Without limiting the discretion to give a caution, the matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:
  - 1) The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public;
  - 2) The authorised officer has reasonable grounds to believe that the person has a mental illness or intellectual disability;
  - 3) The authorised officer has reasonable grounds to believe that the person is homeless;
  - 4) The authorised officer has reasonable grounds to believe that the person is under 18;
  - 5) The authorised officer has reasonable grounds to believe that the person has a special infirmity or is in very poor physical health;
  - 6) The offending behaviour is at the lower end of the scale of seriousness for that offence or is minor in nature;
  - 7) The person claims on reasonable grounds that they did not knowingly or deliberately commit the offence;
  - 8) The person admits the offending behaviour and shows remorse; the person is cooperative and/ or complies with a request to stop the offending conduct. For example, a person stops in a no parking zone for longer than the required time but does not leave the vehicle unattended and agrees to move the vehicle when directed; and
  - 9) There are other reasonable grounds for giving a caution in all the circumstances of the case. For example, the offence was committed because of a medical or other serious emergency.
- c) The fact that one or more of these factors is present does not mean that the authorised officer is obliged to issue a caution. All the circumstances of the case should be taken into account to determine whether a caution is an appropriate and reasonable response to the offence.

## **5.2 Evidence**

- 5.2.1 An authorised officer, wherever possible, shall endeavour to obtain a digital image of any alleged offence of any Council administered legislation as a means of documenting the officers' observations.
- 5.2.2 The image may be used as corroborative evidence in a court.
- 5.2.3 All photographs (including digital images) taken will be stored in a secure environment, and access will only be available to authorised personnel for authorised purposes. The storage and disposal of evidence must be in accordance with *General Retention and Disposal Authority – Local Government Records* (GA 39) and in compliance with the privacy protection principles.
- 5.2.4 Prior to issuing any form of warning, penalty notice or instigating legal proceedings, an authorised officer must ensure that they have established a *prima facie* case, meaning that all of the required elements of the offence are made out.
- 5.2.5 Authorised officers, as required, will attend Court and appear as witnesses on behalf of Council. The authorised officer will adhere to courtroom etiquette and conduct themselves as a credible witness. The authorised officer will ensure that all relevant information is available and a brief of evidence is provided to the Legal Services Unit prior to the Court date. This information has to be provided within the appropriate timeframe to avoid the matter from being withdrawn and legal cost incurred against Council.

## **5.3 Service of penalty notices**

- 5.3.1 A penalty notice, once issued, must be served. For parking offences, the penalty notice will be sent to the registered owner of the offending motor vehicle.

## **5.4 Cessation of enforcement action**

- 5.4.1 If it comes to the attention of the authorised officer, that there is a deficiency contained within a penalty notice, or the notice was issued contrary to law, the authorised officer must cause the penalty notice to be cancelled, or if the matter is before the court, must cause the matter to be withdrawn with the approval of their Coordinator or Manager.

## **5.5 Specific enforcement programs**

- 5.5.1 From time to time, authorised officers develop, implement or participate in specific programs related to targeted enforcement outcomes. Set out below are current programs undertaken by authorised officers:

- a) **School zones**

- Authorised Council officers, as well as the NSW Police Highway Patrol, are also authorised by Transport for NSW to conduct specific

enforcement in designated school zone areas. The intention of the NSW Parliament was clearly demonstrated when changes were made to the demerit point scheme to permit authorised Council officers to issue penalty notices for parking offences in school zones, which now attract demerit points.

Approved review guidelines are published and provide a disclaimer which states:

*“Leniency will generally not be considered for certain offences where safety is an issue. These include demerit point offences in school zones.”*

Procedure:

- 1) Where an authorised officer detects an offence within a school zone, the officer obtains photographic evidence.
- 2) An authorised officer should not verbally engage with an offending motorist, because this may cause the offending behaviour to continue, which jeopardises the safety of school children.
- 3) A penalty notice to the registered owner of the vehicle will be posted.

**c) Heavy/ long vehicles parked in a built-up area**

The issue of illegal truck parking in Liverpool Local Government area is the subject of concern for many residents, a matter which is reflected in the large number of complaints received by Council.

Under NSW traffic law, large trucks and heavy vehicles are prohibited from parking in built-up areas (including but not limited to residential and industrial areas) for any period longer than one hour, (except for certain streets in the LGA which have been sign posted).

A heavy/ long vehicle is defined as a vehicle that has a Gross Vehicle Mass (GVM) greater than 4.5 tonnes, and/ or longer than 7 metres (Note: Buses are exempt).

Heavy/ long vehicles parking on streets cause impact to the amenity of the area by:

- 1) Impeding traffic flow;
- 2) Causing dangerous situations such as reducing visibility; and
- 3) Damage caused to residential infrastructure.

Authorised officers respond to numerous complaints in relation to these vehicles and run specific programs to target these vehicles throughout the year. Penalty notices are issued for most offences relating to heavy / long vehicles, as the drivers of these vehicles have been determined by Transport for NSW to be professional drivers and are expected to know the provisions related to the use of heavy / long vehicles and all restrictions imposed.

Procedure:

- 1) Where an authorised officer detects a heavy / long vehicle parked in a built-up area for a period longer than one hour, the officer will prepare a penalty notice.
- 2) Subsequent patrols will continue, and further detected breaches will result in further penalty notices being issued.
- 3) Should a vehicle be in receipt of more than six penalty notices in a six-month period, an authorised officer may prepare and serve a court attendance notice, in lieu of a penalty notice.
- 4) Any further detected breaches will result in court attendance notices being prepared and served on the registered owner of the vehicle, until such time as the parking of the vehicle complies with the Road Rules.

**d) Vehicles parked on the footpath/ nature strip in residential streets**

The population of the Liverpool Local Government Area is rapidly increasing. The demand for parking is growing, particularly in built-up residential areas. There are a number of households that park vehicles on the street, rather than using off street parking spaces which they are entitled to use. This situation is causing traffic problems, especially in narrow streets, where the increase in vehicles is restricting the use of the street, causing additional congestion, and impeding access for emergency and essential services vehicles and other vehicles. As a result, some residents are parking their vehicles on an adjacent footpath/ nature strip area, contrary to the *NSW Road Rules 2014*.

Rule 197 of the *NSW Road Rules 2014* states:

*A driver must not stop on a bicycle path, footpath, shared path or dividing strip, or a nature strip adjacent to a length of road in a built-up area, unless:*

- *the driver stops at a place on a length of road, or in an area, to which a parking control sign applies and the driver is permitted to stop at that place under these Rules, or*
- *the driver is permitted to stop under another law of this jurisdiction.*

Penalty notices, without prior written warning, will apply for vehicles that unreasonably obstruct pedestrians, cause damage to Council's infrastructure, are located within a school zone (during school zone times), or where the vehicle is a heavy / long vehicle.

Procedure:

- 1) Where an authorised officer detects or receives a complaint of a vehicle parked on the footpath/ nature strip, the officer will issue an education letter to the offending vehicle, and/or all households within the street. The letter will remind motorists of their obligations under

the *NSW Road Rules* and will seek a cooperative approach to making alternative parking arrangements. The letter will specify a time limit for compliance, will clearly outline that further patrols will be undertaken after the expiry of the time limit, and that penalty notices may apply.

- 2) Should a vehicle or household which has received a previous letter continue to offend, a penalty notice may be issued.
- 3) Any breach occurring within a school zone (during school zone times), or if the vehicle is a heavy/ long vehicle, a penalty notice may be issued, without a prior warning notice being issued as outlined above.

**AUTHORISED BY**

Council

**EFFECTIVE FROM**

29 June 2022

**REVIEW DATE**

29 June 2024

**VERSIONS**

*The current and previous version of the procedure should be set out in the following table.*

<b>Version</b>	<b>Amended by</b>	<b>Changes made</b>	<b>Date</b>	<b>TRIM Number</b>
1	Newly created	NIL		310627.2020
2	Governance	Standard converted to Policy	20 July 2022	

**THIS POLICY HAS BEEN DEVELOPED IN CONSULTATION WITH**

*Legal Services*